IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 32, 33, 34 AND 35 OF 2006

1. Shri Ashok Kumar Jalan,
   Hari Bhavan, 64,
   Peddar Road,
   Mumbai – 400 026.

2. M/s. Dupont Sportswear Ltd.
   Plot No. 82-85,
   Bicholim Industrial Estate,
   Bisholim Goa 403 529. ..... Petitioner No.2.
   (Original accused)

V e r s u s

Employees StateInsurance Corporation,
Regional Office, EDC, plot no.23,
Patto-Panaji-Goa,
represented by Shri E. V. Naik
Insurance Inspector,
ESI Corporation.
(Registered Addresses). ..... Respondent

Mr. E. Dias with Mr. Prasanna C. Chawdikar, Advocate for the Petitioner/Original Accused.
Ms. A. A. Agni with Mr. Prabhudessai, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 07th February, 2007.

ORAL JUDGMENT

These four petitions arise from complaints filed under Section 85(a) of the Employees' State Insurance Act, 1948, (Act, for short), for non payment of contributions for the period from October 2000 to September 2001. Each complaint pertains to one quarter i.e. the first complaint is for the period from October 2000 to January 2001 and so on, and therefore, they can be conveniently disposed of by this common Judgment.

2. The petitioner no.1 is one of the Directors of petitioner no.2 and was accused no.2 in the complaint filed, while the Company was accused no.1. The complaints came to be filed with an allegation that accused no.2, who admittedly is the Director of the said accused no.1/Company, was the occupier and hence the principal employer of the factory of accused no.1/Company. It was stated by the Complainant-(Respondent herein), that the accused were required to pay the contributions under the said Act read with Regulations framed thereunder and the same were required to be paid within 21 days of the wage period and since the accused had not paid the said contributions i.e. the employees and employers contributions, they came to be prosecuted under Section 85(a) of the Act read with Regulations 31 of the Employees State Insurance (General) Regulations, 1950.

3. After the complaints were filed, the accused no.2 filed an application for discharge contending that he was not in charge of and was not responsible to the Company for the conduct of the business at the time of the commission of the alleged offences. The objection taken came to be rejected by the learned trial Court by Order dated 06.01.2006. While rejecting the objection taken, the learned Magistrate observed that in the inspection report, the name of accused no.2 was shown as an occupier. The learned trial Court also relied upon the case of ***J.K. Industries Ltd. v. The Chief Inspector of Factories and Boilers (1996 (74) F.L.R. 2608/1997 I.L.J. 722)***. The petitioner no.1/A2, carried a revision against the said Order to the Court of Sessions and the same came to be disposed of by the learned

Additional Sessions Judge, Panaji, by his Order dated 26.06.2006. In dismissing the revision, the learned Additional Sessions Judge noted that in the complaint, there was prima facie averment that the accused no.2 was the principal employer and responsible for the supervision and control of the factory under Section 2(17) of the Act.

4. On behalf of the petitioners, learned Counsel has conceded that the case of ***J.K. Industries Ltd. v. The Chief Inspector of Factories and Boilers*** (supra), holds the field wherein the Apex Court referred to the definition of occupier given in Section 2(n) of the Factories Act, 1948 and with reference to sub-clause (ii) held that there was nothing unreasonable in fixing the liability on a Director of a Company and making him responsible for compliance with the provisions of the Act and the rules made thereunder and laying down that if there is contravention of any of the provisions of the Act or an offence is committed under the Act, the notified Director and in the absence of the notification, any one of the Directors of the Company, shall be prosecuted and shall be liable to be punished as occupier. Admittedly, in the case at hand, the accused no.2 was described as an occupier and therefore the principal employer of the said factory and as such was responsible for the supervision and control of the said factory and the said allegation was more than sufficient to proceed further with the complaint.

5. However, learned Counsel on behalf of the petitioners/accused has referred to Section 45A of the Act, and submitted that the contributions payable

were first required to be determined by any of the Inspectors appointed under the Act and that could be determined, in terms of the proviso thereof only after a reasonable opportunity was given to the petitioners to be heard and unless the provisions of Section 45A of the Act were complied with, no prosecution for contravention of Section 85 (a) of the Act, could be launched. In support of the submission, the learned Counsel on behalf of the petitioners has placed reliance on the Judgment in the case of ***Sawarmal Agarwalla v. State of Assam & Anr. (2006 II L.L.J. 1009)***, wherein a learned Single Judge of Gauhati High Court has stated that in the case of complete non-compliance of the provisions of Section 45A by the Corporation before launching the prosecution, the prosecution of the accused/petitioner was wholly contrary to the law contained in that behalf and could not be sustained.

6. That was a case where process issued under Section 85(a) and 85(e) of the Act was quashed. It is not known whether the accused in that case had paid the contributions prior to the period i.e. prior to October 1993 to March 1994, for which they were prosecuted..

7. Learned Advocate Mrs. Agni, on behalf of the respondent, has submitted that the plea in relation to non-compliance of Section 45A of the Act, was not taken by the petitioner/accused before the Courts below and, therefore, ought not to be allowed to be taken for the first time in extraordinary jurisdiction under Section 482 of the Code. In support of the submission, learned Counsel has

placed reliance on ***Pfizer Ltd. v. Mazdoor Congress & Ors. ((1996) 5 S.C.C. 609)***, wherein the Apex Court observed thus :

> "There was no justification whatsoever for the High Court to have allowed respondents nos. 2 and 3 while hearing the petition under Article 227 of the Constitution to raise a new contention that there had been an unfair labour practice as contemplated by Item 1(f) and the appellant had acted with undue haste. No such contention was urged-before the Labour Court or in revision before the Industrial Court. Even in the writ petition filed in the High Court under Article 227 of the Constitution, challenging the order of the Labour Court and the Industrial Court dismissing the complaints under Section 28 of the said Act, no specific contention had been raised to the effect that there was any undue haste on the part of the appellant in issuing the termination order and which could be regarded as an unfair labour practice. Merely because in an affidavit filed before the Labour Court there was a general statement of unfair labour practice covered by Items 1(a) to (f) could be no ground for the High Court to come to the conclusion that a case under Item 1(f) had been made out because respondents 2 and 3 had not led any evidence in this behalf and nor was this contention specifically raised and argued, as already noticed, before the Labour Court and the Industrial Court or even in the writ petition filed before the High Court."

8. Be that as it may be, in the case at hand, there is no dispute that the petitioners/accused were covered under the Act by giving a Code no.32 as early as 14.07.1987, and, at no stage did the petitioners/accused contested the applicability of the provisions of the Act to their factory by approaching the E.S.I. Court as established, under Section 74 of the Act. Not only that the petitioners/accused paid the contribution regularly upto September 2000 and these prosecutions are for the period from October 2000 to September 2001. Therefore, there was no question at all of the respondent-Corporation making any Order under Section 45A of the Act. It has been stated by the Apex Court in ***Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd. ((1997) 1 S.C.C. 625)***, that whenever the employer denies his liability under, or applicability of, the Act or the quantum of the contribution, it is for the employer and not for the Corporation to approach the ESI Court. The petitioners/applicants having paid the contributions upto September 2000, there was no question of the respondents doing any best Judgment assessment under Section 45A of the Act and, in such a situation, there was no question of the petitioners using the shield of Section 45A to defend the prosecutions launched against them.

9. There is no case made out by the petitioners for interference in extraordinary jurisdiction. The petitions are, therefore, hereby dismissed with costs of Rs.5,000/- in all.

N. A. BRITTO, J.

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